

## REMARKS

The 20 February 2009 Office Action for the above referenced application adds to the substantial evidence produced during the examination of numerous co-pending patent applications that the personnel in TC 3600 lack the skill in the art required to examine patent applications for inventions that include the arts described in the instant patent application.

### **35 U.S.C. § 112 First Paragraph Rejections**

In the 20 February 2009 Office Action claims 48 – 68 are rejected under 35 U.S.C. §112 first paragraph for allegedly failing to define a number of terms. The Assignee traverses the §112 first paragraph rejection of claims 48 – 68 in three ways. First, by noting that the Office Action has failed to establish a prima facie case that the specification does not meet the requirements of §112 first paragraph. Second, by noting that the assertions regarding the alleged lack of written description are not in compliance with the both standards of the Administrative Procedures Act and are therefore moot. Third by noting these claim rejections are non-statutory. The claim rejections are non-statutory because there is no statutory basis for giving any consideration to a written description rejection authored by individuals and/or an organization with a level of skill in the art that is not average or better.

As mentioned previously, the Examiner has failed to establish a prima facie case that the specification does not meet the requirements of §112 first paragraph. MPEP 2163 states that: *“A description as filed is presumed to be adequate, unless or until sufficient evidence or reasoning to the contrary has been presented by the examiner to rebut the presumption. See, e.g., In re Marzocchi, 439 F.2d 220, 224, 169 USPQ 367, 370 (CCPA 1971). The examiner, therefore, must have a reasonable basis to challenge the adequacy of the written description. The examiner has the initial burden of presenting by a preponderance of evidence why a person skilled in the art would not recognize in an applicant's disclosure a description of the invention defined by the claims. Wertheim, 541 F.2d at 263, 191 USPQ at 97. In rejecting a claim, the examiner must set forth express findings of fact regarding the above analysis which support the lack of written description conclusion. These findings should:*

*(A) Identify the claim limitation at issue; and*

*(B) Establish a prima facie case by providing reasons why a person skilled in the art at the time the application was filed would not have recognized that the inventor was in possession of the invention as claimed in view of the disclosure of the application as filed.*

*A general allegation of "unpredictability in the art" is not a sufficient reason to support a rejection for lack of adequate written description."*

Furthermore, *it is well established that "the test of enablement is whether one reasonably skilled in the art could make or use the invention from the disclosures in the patent coupled with information known in the art without undue experimentation."* *United States v. Teletronics, Inc.*, 857 F.2d 778, 785, 8 USPQ2d 1217, 1223 (Fed. Cir. 1988). This has been the primary test of enablement since 1916 (see *Mineral Separation v. Hyde*, 242 U.S. 261, 270 (1916)). *The determination that "undue experimentation" would have been needed to make and use the claimed invention is not a single, simple factual determination (In re Wands*, 858 F.2d 731, 8 USPQ2d 1400 (Fed. Cir. 1988)). *Factors which need to be considered include: the nature of the invention, the state of the prior art, the predictability or lack thereof in the art, the amount of direction or guidance present, the presence or absence of working examples, the breadth of the claims, the relative skill of those in the art and the quantity of experimentation needed* (hereinafter referred to as the Wands factors). *A conclusion of lack of enablement means that, based on the evidence regarding each of the above factors (the Wands factors), the specification, at the time the application was filed, would not have taught one skilled in the art how to make and/or use the full scope of the claimed invention without undue experimentation (In re Wright*, 999 F.2d 1557,1562, 27 USPQ2d 1510, 1513 (Fed. Cir. 1993)). The arguments presented by the Examiner fail to establish the prima facie case required to sustain a §112 first paragraph rejection for a single claim in several ways, including:

1. the first way the February 20, 2009 Office Action fails to establish the prima facie case that the specification does not meet the requirements of §112 first paragraph is that the Examiner has not identified any reasons why a person skilled in the art at the time the application was filed would not have recognized that the inventor was in possession of the invention as claimed, in particular the Examiner failed to consider the Wands factors; and
2. the second way the February 20, 2009 Office Action fails to establish the prima facie case that the specification does not meet the requirements of §112 first paragraph is that the Examiner has only made conclusory statements.

The Assignee submits that the assertion that the specification does not meet the requirements of §112 first paragraph also fail under both standards of the APA. First, as detailed above, the Examiner has not provided any evidence to support these allegations. As a result, the §112 first paragraph rejection of claims 48 – 68 fails under the substantial evidence standard. It is well

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established that conclusory statements do not constitute evidence. Furthermore, the statements supporting the claim rejections were made by an Examiner and an organization with an apparently thorough documented lack of the skill in the relevant arts required to author a valid written description rejection. The apparent allowance of claims 35 – 47 which use identical language to describe a process optimization process makes it clear that the rejection of claims 48 – 58, which describe an article of manufacture for process optimization and claims 59 – 68 which describe a machine for process optimization for a lack of enablement would also fail under the arbitrary and capricious standard.

### **35 U.S.C. § 112 Second Paragraph Rejection of Claims**

In the 20 February 2009 Office Action claims 48 – 68 are rejected under 35 U.S.C. §112 second paragraph. The Assignee traverses the §112 second paragraph rejections of each claim in several ways. First, by noting that the Office Action has failed to establish a prima facie case that the claims do not meet the requirements of §112 second paragraph. Second, by noting that the claim rejections based on assertions of alleged indefiniteness are not in compliance with the Administrative Procedures Act and are therefore moot. Third by noting that the claim rejections are non statutory. The claim rejections are non-statutory because there is no statutory basis for giving any consideration to a written description rejection authored by individuals and/or an organization with a level of skill in the art that is not average or better.

The first way the Assignee will traverse the 35 U.S.C. §112 second paragraph rejection of claims 48 – 68 will be by noting that the arguments presented by the Examiner fail to establish the prima facie case required to sustain a §112 second paragraph rejection. *MPEP 2173.02 states that: definiteness of claim language must be analyzed, not in a vacuum, but in light of:*

- (A) The content of the particular application disclosure;*
- (B) The teachings of the prior art; and*
- (C) The claim interpretation that would be given by one possessing the ordinary level of skill in the pertinent art at the time the invention was made.*

*In reviewing a claim for compliance with 35 U.S.C. 112, second paragraph, the examiner must consider the claim as a whole to determine whether the claim apprises one of ordinary skill in the art of its scope and, therefore, serves the notice function required by 35 U.S.C. 112, second paragraph, by providing clear warning to others as to what constitutes infringement of the patent. See, e.g., Solomon v. Kimberly-Clark Corp., 216 F.3d 1372, 1379, 55 USPQ2d 1279, 1283 (Fed. Cir. 2000). See also In re Larsen, No. 01-1092 (Fed. Cir. May 9, 2001). In the case of claims 1, 49 and 61 the Examiner has failed to establish the prima facie case that the*

specification does not meet the requirements of §112 second paragraph in several ways for every rejected claim. The several ways include:

1. failing to interpret the claims in light of the specification,
2. failing to provide any evidence that someone of average skill in the relevant arts would have difficulty interpreting the claims,
3. failing to establish that the limitation(s) in the claims fail to describe the invention
4. failing to consider the claim as a whole, and/or
5. failing to establish that the rejected claims meet any of the well established criteria for indefiniteness. Specifically, the rejected claims do not: (1) recite a means-plus-function limitation without disclosing corresponding structure in the specification; (2) include a numeric limitation without disclosing which of multiple methods of measuring that number should be used; (3) contain a term that is completely dependent on a person's subjective opinion, and/or (4) contain a term does not have proper antecedent basis where such basis is not otherwise present by implication or the meaning is not reasonably ascertainable (Halliburton Energy Services, Inc. v. M-I LLC, 514 F.3d 1244, 1255, 85 USPQ2d 1663 (Fed. Cir. 2008) and Halliburton, 514 F.3d at 1246, 85 USPQ2d at 1658 (Citing Biomedino, LLC v. Waters Techs. Corp., 490 F.3d 946, 950 (Fed. Cir. 2007)).

As noted previously, the second way the Assignee will traverse the §112 second paragraph rejections of claims 48 – 68 is by noting that the assertions regarding the alleged indefiniteness of the claims are not in compliance with the requirements of the Administrative Procedures Act and are therefore moot. In *Dickinson v. Zurko*, 119 S. Ct. 1816, 50 USPQ2d 1930 (1999), the Supreme Court held that the appropriate standard of review of PTO findings are the standards set forth in the Administrative Procedure Act ("APA") at 5 U.S.C. 706 (1994). The APA provides two standards for review – an arbitrary and capricious standard and a substantial evidence standard. The Assignee respectfully submits that discussion in the preceding paragraphs clearly shows that the instant Office Action fails to provide even a scintilla of evidence to support the allegation that the specification does not meet the requirements of §112 second paragraph and that as a result it fails to meet the substantial evidence standard. The apparent allowance of claims 35 – 47 which use the same language to describe a process optimization process makes it clear that the rejection of claims 48 – 58, which describe an article of manufacture for process optimization and claims 59 – 68 which describe a machine for process optimization for indefiniteness would also fail under the arbitrary and capricious standard.

# Request for information under 37 CFR 1.105

The February 20, 2009 Office Action for the above referenced application contains an unusual request that the Assignee identify the non patent literature references that are relevant. The Assignee notes that the request is unusual because the Examiner had previously indicated that most of these references were considered on March 26, 2008. The request was also unusual because the Examiner did not follow the procedure outlined in the MPEP by providing the reason this request was made. The Assignee determined that the most likely reason was to evaluate the patentability of the claimed invention. Accordingly, the table below contains the previously disclosed references that are believed to be relevant to an evaluation of the patentability of the invention described in application 10/025,794. In making this determination, the Assignee relied on the Manual of Patent Examining Procedure which states: *A prior art reference that "teaches away" from the claimed invention is a significant factor to be considered ... the nature of the teaching is highly relevant and must be weighed in substance (see MPEP 2145).*

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Almost all of the references listed above were deemed relevant in accordance with the guidance provided by the MPEP because they teach away from the claimed methods. A few of the references (i.e. references #100, 101 and 109) were selected because they highlight some of the shortcomings of existing methods and are therefore relevant because they help document the utility of the claimed invention.

It should be noted that the fact that the Assignee has identified the references listed above as being relevant to the patentability of the instant application is not an indication that any of these references would support an anticipation and/or obviousness rejection (many, if not all of them would not support such a determination). The Assignee notes that those signing the February 20, 2009 Office Action do not appear to apply the legal requirements for novelty defined by 35 USC 102 or 35 USC 103 during the review of patent applications by large companies so it would be arbitrary and capricious to apply these considerations to the instant application or to other applications in the Assignee's portfolio.